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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-367

IN THE MATTER OF PARKER SQUARE, INC.,
a Corporation,
Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

IN THE MATTER OF PARKER SQUARE, INC.,
a Corporation,
Bankrupt.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on the 16th day of May, 1975. A Petition for Rehearing was denied on the 16th day of June, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, in this case, is unpublished by direction of that court, and therefore does not appear in the official decision. The unpublished opinion appears, verbatim, in the Appendix to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review by Writ of Certiorari the order of the United States Court of Appeals is believed to be conferred by 48 U. S. Statutes, 926, and which states, in its pertinent part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods (a) by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW

The petitioner-corporation filed a Chapter X Petition for Reorganization which was approved by a District Judge, and a date was set for hearing a plan of reorganization. The questions presented for review are:

1. Whether, prior to the presentation of the plan, another District Judge to whom the case was assigned, may, or should, without either notice to the debtor, or a hearing, exclude all the property of the debtor from the Chapter X proceeding so that it may be sold at a state court foreclosure sale on that same day.
2. Whether real property of a debtor in reorganization, which has an actual value greatly in excess of the mortgage indebtedness against it, should be excluded from a Chapter X proceeding upon the ex-parte application of the mortgage creditor.
3. Whether a desire, and need, of a debtor to escape from the jurisdiction of the state courts, and the point in time at which Bankruptcy Court jurisdic-

tion is sought, are, of themselves, a showing of bad faith when the debtor was never accorded an opportunity to present a plan of reorganization and carry its burden of proving lack of that assumed bad faith.

4. Whether the United States Court of Appeals, Tenth Circuit, committed additional error in forgiving the creditor for its omission to give notice of its Application to Exclude Property, and obtaining the ex-parte order without a hearing on the merits.

5. Whether the United States Court of Appeals, Tenth Circuit, abandoned its judicial function when it condoned district court proceedings which that appeals court itself also characterized in its opinion as "most unsatisfactory."

PROVISIONS OF LAW INVOLVED IN THE CASE

Petitioner claims a right of relief under Chapter X of the Bankruptcy Act of July 1, 1898, as amended, the pertinent provisions of which appear as Appendix D, hereof, 11 U.S.C. 541, 11 U.S.C. 544, 11 U.S.C. 545, 11 U.S.C. 546, 11 U.S.C. 548, 11 U.S.C. 561, 11 U.S.C. 606, 11 U.S.C. 607, and 11 U.S.C. 610.

STATEMENT OF FACTS

On the 15th day of March, 1974, the Petitioner filed in the United States District Court for the Western District of Oklahoma a Petition as provided for in Chapter X of the United States Bankruptcy Act. At the time of filing, the Honorable Luther B. Eubanks, Judge of the United States

District Court for the Western District of Oklahoma, entered an Order approving said Petition, continuing the Petitioner in possession, and enjoining the commencement or continuation of any action at law, or suit or proceedings in equity against said Debtor.

At the time of the filing of said Petition for Reorganization, there was pending against the Petitioner, in the District Court of Pottawatomie County, a suit in foreclosure (District Court Case No. C-73-260) wherein a foreclosure sale of certain property owned by the Debtor-Appellant was ordered to be held on the 19th day of March, 1974. The plaintiff in this foreclosure lawsuit was the American National Bank and Trust Company of Shawnee, Oklahoma, which was also the principal creditor of the Petitioner. In the foreclosure lawsuit, the 19th day of March, 1974, at 10:00 o'clock a.m. had been set by the District Court of Pottawatomie County as the date and time for the sale, at a Sheriff's foreclosure sale, of the Petitioner's property located in Pottawatomie County, and which is set out and fully described in the Chapter X Petition on file in this case.

On the 18th day of March, 1974, the attorney for the American National Bank and Trust Company of Shawnee, Oklahoma, appeared before the Honorable Luther Bohanon, and made an oral application for the dismissal of the Petitioner's Chapter X Petition and further requesting that the real property of the Petitioner, which was the subject of the foreclosure suit in Pottawatomie County be excluded from the Bankruptcy proceedings, in order that the Bank-Creditor could continue with its foreclosure action. Refer-

ence to the record in this Appeal will conclusively show that there was no proper notice given by said Bank-Creditor, to either the Petitioner or to any other Creditor or interested party. In fact, reference to the District Court Docket Sheet will show that the Entry of Appearance of the attorney for the Bank-Creditor, was also made on that same day of March 18, 1974.

Further reference to the Docket Sheet of the District Court proceedings will show that the Application of the Bank-Creditor, for the relief for which it sought, and obtained, was not filed until March 19, 1974.

At this point, the Court's attention is called to the minute of the court made on March 15, 1974, which specifically provided for a hearing of objections to the continuation of the "Debtor" in possession to be held on April 22, 1974, and which points out that this ex-parte appearance of the Creditor-Bank, before Judge Bohanon on March 18, 1974, was a total disruption of the orderly proceeding of this case.

On the 19th day of March, 1974, the attorney for the Creditor-Bank again appeared before the Honorable Luther Bohanon, with an Order to be signed by the said Judge, which purportedly reflected the alleged proceedings which had taken place on the previous date. At this time, the principal officer of the Petitioner appeared with the Company's attorney, and objected to the signing of the Order. The Trial Judge refused to sign the Order first presented to him by the Bank's attorney with the statement that it was not what he agreed to. This event transpired at approximately 9:50 a.m. on the day of March 19, 1974, and

upon the Judge's refusal to sign the Order as presented, the meeting was concluded and all parties left the Judge's chambers. At some later hour, on that same day, an Order was filed in the case, signed by Judge Bohanon, approved only by the attorney for the Bank-Creditor, and which vacated the Order of Judge Eubanks, approving the Chapter X Petition and continuing the Debtor in possession. This Order also specifically allowed the American National Bank and Trust Company to conduct all sale and other proceedings in Case No. C-73-260, and at 10:00 o'clock a.m., on that same day, the Sheriff of Pottawatomie County, Oklahoma, struck off and sold, at public auction, to the only bidder at that sale, the real property of the Debtor-Corporation.

The property foreclosed upon sold for $28,000.00 more than necessary to completely satisfy the debts sued upon by the American National Bank and Trust Company of Shawnee, Oklahoma. The price obtained at the Sheriff's Sale was $114,000.00 and the Bank's judgment was $86,-000.00, leaving the excess of $28,000.00.

On March 22, 1974, this case was referred to Bankruptcy Judge David Kline, to hear and determine all matters not specifically reserved to the District Court by Chapter X of the Bankruptcy Act.

On April 4, 1974, the Bankruptcy Judge entered an Order to set down for hearing the Application of the Petitioner for a temporary delay of disbursement of the proceeds of the foreclosure sale. Thereafter, on April 9, 1974, for no apparent reason known to the Petitioner, the Bankruptcy Judge vacated the Order for the Show Cause hearing on the Debtor's Application for delay of disbursement.

On April 18, 1974, the present Counsel for the Petitioner filed with the Bankruptcy Court a motion to reconsider the rulings of the District Judge made on March 18, and March 19, 1974, wherein the real property of the Petitioner was excluded from the Chapter X proceedings and this matter came on for hearing before the Bankruptcy Judge on May 14, 1974. After a brief hearing the Bankruptcy Judge declined to exercise jurisdiction over the matter and referred the case to the District Court to be heard by Judge Bohanon.

On June 6, 1974, the Petitioner's motion to reconsider came on for hearing before the Honorable Luther Bohanon, and the transcript of that proceeding shows the following events to have transpired:

(1) On page 2, the Petitioner's attorney commences with an opening statement of the relief being sought.

(2) At the middle of page 3, the District Judge interrupts Counsel for the Petitioner and turns to hear what Mr. Robinson, attorney for the purchaser at the foreclosure sale, has to say.

(3) At the bottom of page 4, the court inquires, as to whether the "Debtor" has any evidence to be presented; this attorney replied "yes," and gave a brief statement of its nature.

(4) At page 6, the court states that the application will be denied.

(5) At page 8, the court states that the "Debtor" can take an appeal, if it wants to, and reiterates on that same page that the "Debtor" had better take it to the Tenth Circuit Court of Appeals.

The proceeding which appears in this transcript is the only adversarial hearing with notice which ever took place before the District Court in this Chapter X proceeding. This hearing did not take place until after the property of the Debtor had been excluded from the Chapter X proceeding and had been dissipated by an unfair foreclosure sale held by the Creditor-Bank. At this hearing, the Petitioner was denied all fair opportunity to present evidence as to why it should be left in possession of its property, at least for the time necessary to have presented a plan of reorganization to the District Court. It is patently clear that the Judge's decision was made without the Petitioner being given an opportunity to fully state its case and to present any evidence whatsoever. It is also clear, from the total record on appeal, that there had been no prior opportunity for the Petitioner to state its case and present evidence as to why it should be left in possession of its property and be allowed to present a plan of reorganization to the District Court.

The Order of Judge Bohanon of the 18th day of March, 1974, which excluded the Debtor's property was approved only by the attorney for the American National Bank and Trust Company of Shawnee, Oklahoma, and inaccurately recites that the Debtor appeared "by its attorney, B. J. Brockett." In truth and fact, the Debtor was unrepresented and had no notice of the Bank-attorney's March 18 appearance before the court. Therefore, the Petitioner-Debtor's property was excluded without notice and as a result of a non-adversarial "hearing."

Another grossly erroneous Order of the court is Judge Bohanon's Order of June 6, 1974, which dismissed the Chapter X Petition. This order improperly recites in numbered paragraph 4:

> "That Counsel for the Debtor, Parker Square, Inc., does not dispute the arguments of Counsel for the American National Bank of Shawnee, Oklahoma, and that there is no reason for the Court to retain jurisdiction herein."

This Order was also not approved by the Debtor's attorney. A brief reading of the transcript of proceedings of June 6, 1974, will show paragraph 4 to incorrectly reflect the happenings of that day.

A motion was filed asking the court to correct the Order, and setting out that *Debtor's Counsel had actually objected to opposing Counsel of the form and Order and had approved one in an alternative form.* The court entered a minute stating that he was without jurisdiction to take action on the Debtor's motion to correct the Court's Order and that its filing is for naught.

This concluded the District Court proceedings.

REASONS FOR GRANTING THE WRIT

1.

BAD FAITH WAS ONLY INFERRED BY THE TRIAL COURT FROM THE PETITIONER'S DESIRE TO ESCAPE FROM THE STATE COURT PROCEEDING.

Throughout the proceedings in the trial court none of the reasons of bad faith, as set out in Section 546, were argued except that which relates to the pendency of prior proceedings in other courts. In fact, the only reason which was ever cited by the Trial Judge as any basis for his decision is best exemplified on page 6, Vol. III of the record on appeal, where the Trial Judge interrupted Counsel to make the following statement:

> "THE COURT: (Interposing) Well, you came to this Court when the doors were about to be shut on you in the State Court and you asked this Court to proceed and vacate and stop the State Court proceedings.
>
> "The information that I had, and I am sure the record will show that the plaintiff in that case had been begging and crying and hounding the debtor to pay, to pay, to pay. They never did so. Then they brought the foreclosure action, they got a judgment and then sold it, and then vacated it, and then sold it again, and you come to this Court; and they were entitled to foreclose their judgment.
>
> "The Court will deny your application."

These statements by the Trial Judge show that he took the view that the Petitioner's attempts to escape the consequences of the State foreclosure action were *prima facie* evidence of bad faith, and was his justification for dismissal

of the petition. Such a conclusion or position by the Trial Judge is gross error. In the first place, the Bankruptcy Act itself provided, in 11 U.S.C.A. 548:

> "that the initial order approving the petition,
>
> * * * * * *
>
> "shall operate as a stay of prior pending bankruptcy, mortgage foreclosure, or equity receivership proceedings, and of any act or other proceeding to enforce a lien against the Debtor's property."

By no means could it be said that a result, which was produced by the terms and provisions of the Bankruptcy Act itself, is a showing of bad faith.

Also, with respect to whether a desire to escape from the foreclosure suit in Pottawatomie County is a showing of bad faith, this Court is referred to the case of *Marine Harbor Properties* v. *Manufacturers Trust Company*, N.Y. 1942, 63 S.Ct. 93, 317 U.S. 78, 87 L.Ed. 64, 51 Am. Bankr. Rep. N.S. 1, *rehearing denied* 63 S.Ct. 254, 317 U.S. 710, 87 L.Ed. 566. Wherein it is stated by the Court:

> "(A)nd, in determining whether petition for corporate reorganization has been filed in 'good faith' as required by this Chapter, the alleged desire of the corporation to escape from prior proceedings is immaterial."

Therefore, there is not a rational basis for the denial and dismissal of the Debtor's petition for reorganization on the sole premise that it is attempting to escape the consequences of the foreclosure lawsuit in Pottawatomie County, nor is there a rational basis for denying or dismissing the petition on the grounds that it is unreasonable to

believe that a plan of reorganization would be successful, because there has not been one iota of evidence presented by any creditor to show that a plan of reorganization would fail, and the Petitioner has not been accorded an opportunity for a hearing to present such a plan and demonstrate, from evidence, that it in fact does have a chance for success.

2.

THE EXCLUDED PROPERTY OF THE PETITIONER HAD A VALUE SUBSTANTIALLY IN EXCESS OF THE MORTGAGE INDEBTEDNESS, AND SUCH BEING THE CASE, IT WAS ERROR FOR THE COURT TO EXCLUDE SAID PROPERTY FROM THE PROCEEDING AND TO DISMISS THE PETITION WITHOUT SOME EVIDENTIARY SHOWING OF OTHER PREJUDICE TO THE CREDITORS.

The total mortgage indebtedness sued on by the American National Bank and Trust Company, in the Pottawatomie County foreclosure was $86,000.00. The property of the Petitioner was sold twice at foreclosure sale, the first sale being set aside for irregularities. At the first sale, the property brought a price of $112,000.00; at the second sale, it brought a price of $114,000.00. It was appraised by three court-appointed appraisers at $171,000.00. Under these circumstances, the Creditor-Bank cannot be heard to say that it was insecure.

The Bankruptcy cases show a traditional reluctance of the courts to exclude mortgaged property from a Chapter X proceeding, so that a Creditor may foreclose upon it where there is no immediate danger of the Creditor's loss of that security and where the security has a value sub-

stantially in excess of the encumbrance. This is demonstrated in the case of *In re U. S. Realty and Implement Company*, C.C.A. N.Y. 1946, 153 F.2d 853. In the *U. S. Realty* case, the Court properly continued an injunction restraining a bank from realizing on its mortgage, pending efforts to work out reorganization of the Debtor, because the margin of security for the debt was so large to insure the bank against any probable loss for a considerable period of time. Exactly those circumstances existed in this case, but rather than to follow the established case law, the District Court excluded the property so as to allow the bank to continue its foreclosure and later dismissed the petition in its entirety.

In the case of *Marine Harbor Properties* v. *Manufacturer's Trust Company* (*supra*), a petition for reorganization was disapproved, but only upon a clear showing that the corporate debtor's property was worth less than the first mortgage indebtedness on it and that continuation of State Court foreclosure proceedings would not deny junior creditors any benefits which corporate reorganization proceedings would afford them. The *Marine Harbor* case sets out the evidentiary considerations which must be made before a reorganization court permits foreclosure upon a debtor's property which has substantial equity. The rationale of these decisions is: that where a secured creditor is over-secured and where there is no immediate danger of loss of value of that security, any substantial equity in that property should be retained in the Bankruptcy reorganization estate for at least so long a time as necessary to determine whether the junior creditors can be benefited without permanent loss to the secured creditor. In this case,

there was a total failure by the District Court to make such consideration for the benefit of junior creditors. Also, the summary exclusion of the real property from the Debtor's estate and the later summary dismissal of the reorganization petition worked a severe prejudice to the Petitioner by unnecessarily foreclosing the possibility of a rehabilitation. This was a total failure of the District Court to follow the criteria, set out by this Supreme Court in its prior decisions, and this failing was repeated by the Court of Appeals, Tenth Circuit.

3.

THE PETITIONER WAS DENIED ITS RIGHT TO A HEARING UPON PROPER NOTICE PRIOR TO THE EXCLUSION OF ITS PROPERTY FROM THE CHAPTER X PROCEEDING.

It is provided in 11 U.S.C. 544 that if an Answer be filed by any creditor, which controverts any of the material allegations of the petition, the Judge shall, as soon as may be, "determine" without the intervention of a jury, the issues presented by the pleadings and enter an Order approving the petition, if satisfied it complies with the requirements of "good faith," or dismissing it if not so satisfied.

It is unequivocally stated in 11 U.S.C. 606 that "the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter."

The Bankruptcy Act is rather flexible with regard to the notice required in most instances. It is generally provided in 11 U.S.C. 607, that except where otherwise provided, the Judge may, from time to time, enter Orders

respecting notice requirements. The combined effect of these statutes is to require that upon a filing and initial approval of a Chapter X petition, even though it might be done *ex parte*, that subsequent to that time any issues to be joined must be done so by the filing of an Answer by one or more of the creditors and that a determination, upon notice, must then be made upon those pleadings.

The District Court Judge did not follow the Statutes of the United States and require proper notice to be given to the Petitioner, nor did he accord the Petitioner the right to be heard on matters arising in the proceeding. Neither did the Court of Appeals, Tenth Circuit, follow and observe the Statutes of the United States when it affirmed the District Court decision.

4.

THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND THE COURT OF APPEALS SANCTIONED THE DEPARTURE SO AS TO REQUIRE AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The District Court's omission to follow the Statutes of the United States and the decisions of this Supreme Court is a gross departure from usual and accepted judicial proceedings. The subsequent affirmation of the District Court's rulings and decision by the Court of Appeals, especially upon that Court's statement that the District Court proceedings were "most unsatisfactory," was a further departure from usual and accepted judicial proceedings. Such departures from the accepted and usual course of judicial

proceedings calls for an exercise of this Supreme Court's power of supervision.

Respectfully submitted,

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September, 1975

APPENDIX A

FILED
MAR 19 1974
Rex B. Hawks
Clerk, U. S. District Court
Alice Faye Johnson,
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

In the Matter of	)	IN PROCEEDINGS FOR
PARKER SQUARE, INC.,	)	THE REORGANIZATION
a corporation,	)	OF A CORPORATION
	)	No. BK-74-434
Debtor.	)	

ORDER VACATING ORDER APPROVING
PETITION AND CONTINUING DEBTOR
IN POSSESSION

On this 18th day of March, 1974, the Application of the American National Bank and Trust Company of Shawnee to vacate the Order Approving Petition and Continuing Debtor in Possession filed herein on March 15, 1974, came on to be heard and the Applicant, American National Bank and Trust Company of Shawnee, appeared by its attorney, Sidney R. Clarke III, and Parker Square, Inc., appearing by its attorney, B. J. Brockett.

The Court examined the file, heard argument of counsel and FINDS; and

It is therefore ORDERED, ADJUDGED and DECREED that the allegations of Applicant's verified Application are true and correct and for the reasons stated therein the Order Approving Petition and Continuing Debtor in Possession filed March 15, 1974, should be vacated to allow Applicant to conduct all sale and other proceedings in American National Bank and Trust Company vs. Parker

Square, Inc., Case No. C-73-260 and to allow the Court Clerk of Pottawatomie County of Oklahoma, to pay and distribute the proceeds of the sale of the real property involved in satisfaction of Applicant's Judgment against defendant in said cause.

s/ Luther Bohanon
Luther Bohanon
United States District Judge

APPROVED:

s/ Sidney R. Clarke III
Clarke & Van Wagner, Inc.
Attorney for Applicant
American National Bank and
Trust Company of Shawnee
P.O. Box 1117—130 North Broadway
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FILED
JUL 2 1974
Rex B. Hawks
Clerk, U. S. District Court
By Judith (illegible),
Deputy

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

In the Matter of	)	IN PROCEEDINGS FOR
PARKER SQUARE, INC.,	)	THE REORGANIZATION
a corporation,	)	OF A CORPORATION
	)	No. BK-74-434

ORDER

NOW, on this 6th day of June, 1974, there comes on for hearing before this Court Debtor's Motion to Reconsider and the Application of Windsor Finance Corporation for

Trustee to Remove Personal Property. The Debtor, PARKER SQUARE, INC., appears in person by Charles O. Parker and by counsel, Riley Brock; Trustee Bob Garretson appears in person; American National Bank of Shawnee appears by counsel, Sidney R. Clarke, III; and Windsor Finance Corporation appears in person by Jim Sutherland and by counsel, James F. Robinson.

The Court being fully advised in the premises, and after hearing arguments of counsel, finds:

1. That the premises known as PARKER SQUARE, INC. Bowling Alley in Shawnee, Oklahoma was sold on March 19, 1974 at a Sheriff's Sale pursuant to Court Order to Windsor Finance Corporation.

2. That said sale was confirmed by the District Court of Pottawatomie County, Oklahoma on March 26, 1974.

3. That this Court makes no determination as to the validity of said sale, but after hearing arguments of counsel, determines that Debtor's Motion to Reconsider should be overruled.

4. That counsel for Debtor, PARKER SQUARE, INC., does not dispute the arguments of counsel for the American National Bank of Shawnee, Oklahoma and that there is no reason for the Court to retain jurisdiction herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Debtor's Motion to Reconsider be and hereby is overruled; that the Trustee, Bob Garretson, be and hereby is discharged in this cause; that the bankruptcy proceedings be, and hereby are dismissed; that the District Court of Pottawatomie County be, and hereby is ordered to proceed in this matter without further interference from this Court.

s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

[APPENDIX]

APPROVED:

RILEY BROCK
Attorney for Parker Square, Inc.

s/ G. R. Garretson
BOB GARRETSON, Trustee

s/ Sidney R. Clarke, III
SIDNEY R. CLARKE, III
Attorney for American National
Bank of Shawnee

s/ James F. Robinson
JAMES F. ROBINSON
Attorney for Windsor Finance
Corporation

APPENDIX B

FILED
MAY 16 1975
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In the Matter of	)	
	)	
PARKER SQUARE, INC.,	)	No. 74-1502
a Corporation,	)	
	)	
Bankrupt.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. BK-74-434)

Douglas D. Althoff (Riley Brock on the brief) for Bankrupt.

George Van Wagner, of Clarke & Van Wagner, Inc., for American National Bank and Trust Company.

Before LEWIS, Chief Judge, and BREITENSTEIN and McWILLIAMS, Circuit Judges.

PER CURIAM.

In this Chapter X bankruptcy the controversy revolves around the refusal of the trial court to stay a court foreclosure sale. We affirm.

In March, 1965, the debtor, Parker Square, Inc., gave a mortgage on Oklahoma real estate to American National Bank and Trust Company. Because of debtor's defaults, Bank in July, 1973, brought foreclosure proceedings in an Oklahoma state court. On October 29, 1973, the state court gave judgment for Bank and against the debtor in the amount of $83,378.87 plus interest. On court order the property was sold for $112,000. The sale was set aside because of an inadequate appraisal. On February 13, 1974, the court again ordered sale which was to be held on March 19 at 10:00 A.M.

Late in the afternoon of Friday, March 15, debtor filed a Chapter X petition which was approved by Judge Eubanks acting for Judge Bohanon. The effect of this action was to stay automatically the state court foreclosure sale. On the afternoon of Monday, March 18, an attorney for Bank appeared before Judge Bohanon and made an oral request for an order which would permit the foreclosure to proceed. Judge Bohanon agreed and requested the preparation of a written order.

On the next day and before 10:00 A.M., the time set for the foreclosure sale, the Bank attorney presented the order which he had prepared. The then attorney for the debtor was present. The judge did not sign the order because his intent was only to permit the foreclosure to proceed and not to dismiss the Chapter X proceedings. A corrected order was entered later in the day.

The foreclosure sale went ahead and the property was sold for $114,000. The state court approved the sale and ordered disbursement of the proceeds. The bankruptcy judge to whom, as special master, the Chapter X proceedings had been referred ordered a delay in the disbursement:

This order was later vacated. The record is not clear on whether disbursement was made. On July 2, Judge Bohanon dismissed the Chapter X proceedings and three days later debtor filed its notice of appeal.

Bank was both a secured creditor and a substantial stockholder in debtor. No other creditors or stockholders have appeared in this appeal by the debtor corporation. The Chapter X petition lists as liabilities the first mortgage debt to Bank and a $30,000 second mortgage which debtor contests on the ground that it secures a personal debt of debtor's president. Additional liabilities were ad valorem state taxes, $1,391.95 and miscellaneous debts, $1,700. Debtor further stated in its petition that it had "only a small sum of cash on hand."

We are not interested in the charges, challenges, and recriminations of the parties. When all is said and done, the fact remains that debtor waited over eight months after the filing of the state foreclosure action and late on a Friday afternoon obtained an ex parte order which stopped the foreclosure sale set for the morning of the next Tuesday. If debtor had the equity which it claims in the property, a reasonable assumption is that it would have done something about the foreclosure during the eight-month period. The charge that Bank obtained the exclusion of the property from the Chapter X proceedings without formal notice is not impressive in the light of debtor's action in waiting until the last minute to file those proceedings.

We recognize the statement in Marine Harbor Properties, Inc. v. Manufacturers Trust Co., 317 U.S. 78, 84, that a debtor's intent to escape state court jurisdiction is not itself a test of good faith in applying for Chapter X relief. Marine Properties also says that a Chapter X petitioner must demonstrate that Chapter X affords to creditors or stockholders some "benefits, advantages, or protection" which the state proceeding denies. In re Colorado Trust

Deed Funds, Inc., 10 Cir., 311 F.2d 288, 289, says that the burden of establishing good faith is on the petitioner.

Although the manner in which these proceedings were handled is most unsatisfactory, we believe that the manifest intent of the Chapter X filing was to delay the state foreclosure. The petition was properly dismissed. See Arey & Russell Lumber Co., Inc. v. American Nat. Bank & Trust Co., of Danville, Virginia, 4 Cir., 201 F.2d 508. We are convinced that no good purpose would be served by any attempt at this time to unscramble the events which have occurred.

Affirmed.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, DENYING PETITION FOR REHEARING

MAY TERM—JUNE 16, 1975

Before The Honorable David T. Lewis, Chief Judge, The Honorable Jean S. Breitenstein and The Honorable Robert H. McWilliams, Circuit Judges

IN THE MATTER OF:	)	
	)	
PARKER SQUARE, INC., a corporation,	)	
Bankrupt,	)	
	)	
PARKER SQUARE, INC.,	)	
	)	
Appellant,	)	
vs.	)	No. 74-1502
	)	
BOB GARRETSON, Trustee, AMERICAN NATIONAL BANK OF SHAWNEE and WINDSOR FINANCE CORPORATION,	)	
	)	
Appellees.	)	

This matter comes on for consideration of the appellant's motion to file a petition for rehearing out of time; the appellant's petition for rehearing with suggestion for rehearing en banc; and the appellant's motion to stay the mandate, which issued June 9, 1975.

Upon consideration whereof, it is ordered as follows:

(1) The motion to file a petition for rehearing out of time is granted. The petition for rehearing is ordered filed this date.

(2) The petition for rehearing is denied on the merits.

(3) The motion to stay the mandate is denied.

HOWARD K. PHILLIPS, Clerk

s/ By: Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

s/ Mary A. Sherman
Deputy Clerk

APPENDIX D

Applicable Provisions of the Bankruptcy Act of 1898. Title 11, United States Code.

§ 501. Exclusive application of chapter

The provisions of this chapter shall apply exclusively to proceedings under this chapter.

§ 541. Petition of debtor

Upon the filing of a petition by a debtor, the judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith, or dismissing it if not so satisfied.

§ 544. Controversial answer by creditor, indenture trustee, or stockholder; determination of issues

If an answer filed by any creditor, indenture trustee, or stockholder shall controvert any of the material allegations of the petition, the judge shall, as soon as may be, determine, without the intervention of a jury, the issues presented by the pleadings and enter an order approving the petition, if satisfied that it complies with the requirements of this chapter and has been filed in good faith and that the material allegations are sustained by the proofs, or dismissing if not so satisfied.

§ 545. Finality of determinations

If any issue raised in an answer filed under section 536 or 537 of this title has, after hearing upon notice to the debtor, creditors, indenture trustees, and stockholders entitled to controvert the allegations of the petition, already been tried and finally determined under the provisions of section 543 or 544 of this title, such final determination shall be conclusive for all purposes under this chapter.

§ 546. Good faith of petition

Without limiting the generality of the meaning of the term "good faith", a petition shall be deemed not to be filed in good faith if—

(1) the petitioning creditors have acquired their claims for the purpose of filing the petition; or

(2) adequate relief would be obtainable by a debtor's petition under the provisions of chapter 11 of this title; or

(3) it is unreasonable to expect that a plan of reorganization can be effected; or

(4) a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be the best subserved in such prior proceeding.

§ 548. Order of approval as stay of other proceedings

Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property.

§ 561. Hearing; time and notice

The judge shall fix a time of hearing, to be held not less than thirty days and not more than sixty days after the approval of the petition, of which hearing at least thirty days' notice shall be given by mail to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission and such other persons as the judge may designate, and, if directed by the judge, by publication in such newspaper or newspapers of general circulation as the judge may designate.

§ 606. Persons entitled to hearings

The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard

on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees.

§ 607. Intervention of parties; notices generally

The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter. Except where otherwise provided in this chapter, the judge may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notice shall be given.

§ 610. Same; statement by attorney

An attorney for creditors or stockholders shall not be heard unless he has first filed with the court a statement setting forth the names and addresses of such creditors or stockholders, the nature and amounts of their claims or stock, and the time of acquisition thereof, except as to claims or stock alleged to have been acquired more than one year prior to the filing of the petition.

CERTIFICATE OF SERVICE

I certify that on the _____ day of September, 1975, I forwarded by first class mail, three copies of the foregoing Petition for Certiorari to the following:

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